In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1702

HERBERT GUEST, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the government failed to prove the chain of custody of narcotic substances admitted into evidence against him.

After a jury trial in the United States District Court for the Middle District of Georgia, petitioner was convicted on all nine counts of an indictment charging illegal sale and distribution of stimulant drugs, counterfeit drugs, and non-narcotic controlled substances; knowing possession of a non-narcotic controlled substance; and holding a counterfeit drug for sale; all in violation of 21 U.S.C. (Supp. V, 1964 ed.) 331(q)(2), 333(b), and 21 U.S.C. 331(i)(3), 841(a)(1). He was sentenced to a year's imprisonment on each of three counts and five years' imprisonment on each of the remaining six counts, all sentences to run concurrently, and was fined a total of $11,000. He was also sentenced to a special parole

term of fifteen years on each of five counts, to run concurrently. The court of appeals affirmed without opinion (Pet. App. A).[1]

At trial, the government introduced twelve exhibits (Gov. Exs. 1-12) consisting of various capsules and tablets containing amphetamine and caffeine, which had been obtained from petitioner either through purchase by an undercover agent of the Georgia Bureau of Investigation or by seizure pursuant to a search warrant executed shortly after petitioner's arrest.

The materials in Exhibits 2 through 12 were each given by GBI Agent Copeland to BNDD Agent Smith, initialled and sealed by Copeland and Smith, and sent by registered mail to the Narcotics and Dangerous Drugs Laboratory in Washington. There each was received, receipted for, and transmitted, still under seal, to chemist Manganello, who subsequently testified at the trial. He broke the seal, performed certain tests, resealed and initialled the evidence, and placed it in the laboratory vault, where it remained until just before trial (Tr. 109, 169, 180-181). Immediately prior to trial, Manganello personally retrieved the exhibits and mailed them to the Atlanta BNDD office, which transmitted them to the United States Attorney still under seal. The seal was inspected by Manganello and broken for the purpose of removal of the exhibits at the start of trial (Tr. 180-181).

Petitioner's sole contention is that the government failed to prove the chain of custody of this evidence, since it did not offer the testimony of every postal

[1] The court of appeals affirmed on April 17, 1973, and denied a petition for rehearing on May 14, 1973. The petition for a writ of certiorari was filed on June 15, 1973, and is therefore out of time under Rule 22(2) of the Rules of this Court.

employee who handled the packages containing the evidence while they were in transit to and from the BNDD Laboratory, and that he therefore has been deprived of his Sixth Amendment right of confrontation. The contention is groundless.

To be admitted into evidence, an object connected with a crime need only be shown to be in substantially the same condition as when the crime was committed. *United States* v. *S.B. Penick & Co.*, 136 F. 2d 413 (C.A. 2); *Williams* v. *United States*, 381 F. 2d 20, 21 (C.A. 9). That showing was plainly made in the instant case (Tr. 161-190, 197-198). Petitioner's objections as to the chain of custody go to the weight to be accorded such evidence, rather than to its admissibility, and are therefore proper questions for the jury—questions which the jury here resolved against petitioner. See *United States* v. *Graham*, 464 F. 2d 1073 (C.A. 5).

Moreover, petitioner has offered no evidence to rebut the long-established presumption that mail properly addressed, sent in the normal course of the mails, and reaching its intended destination in usual time is actually received by the addressee in the same condition as it was sent. *Hagner* v. *United States*, 285 U.S. 427, 430; *Rosenthal* v. *Walker*, 111 U.S. 185, 193.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1973.